

39- 1475 ①

Supreme Court, U.S.

FILED

MAR 20 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

CHARLES A. SILVA and LIVING WATERS PUBLISHING
AND DISTRIBUTING, INC.,
Petitioners,

v.

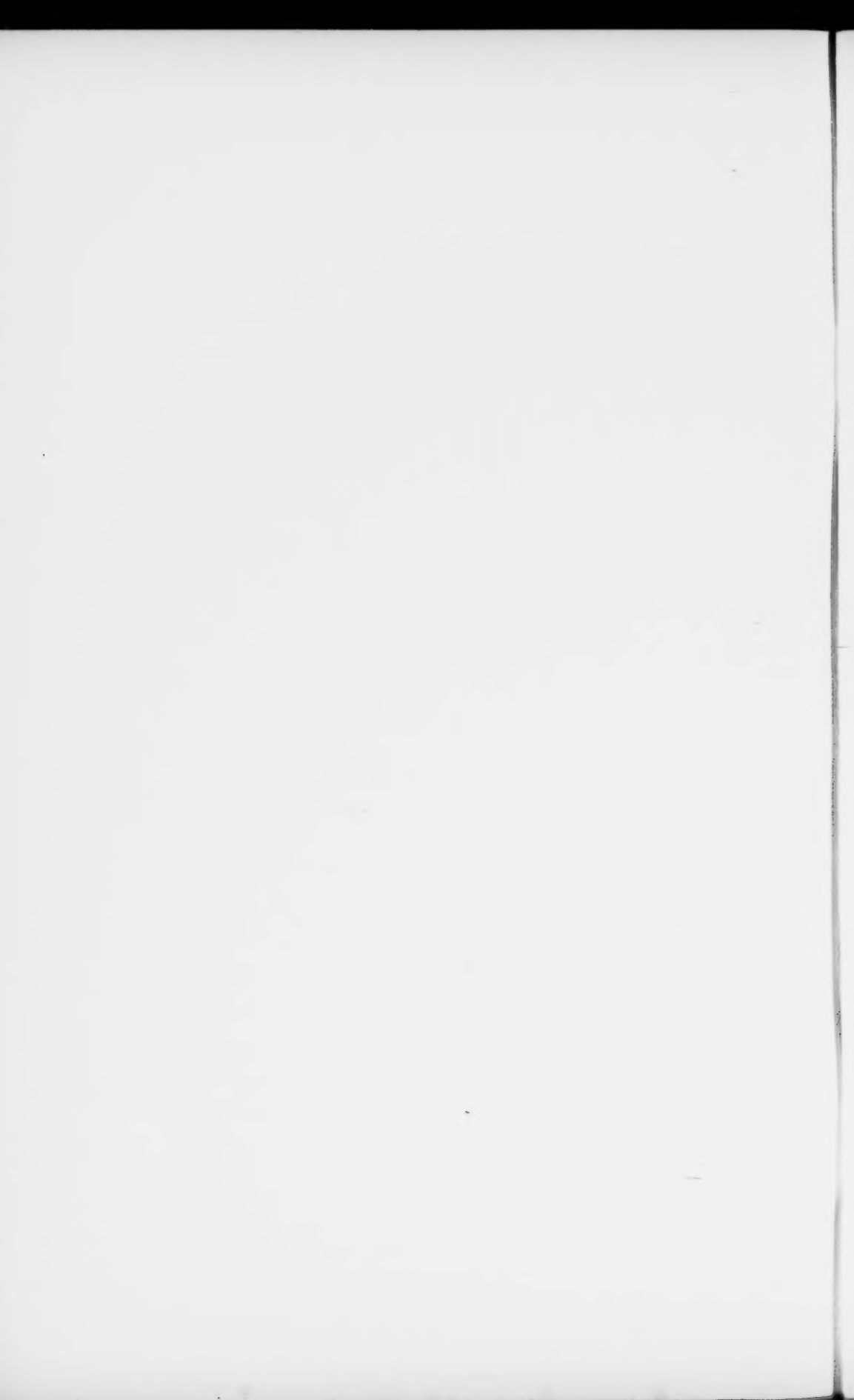
SHIRLEY MACLAINE, COLIN HIGGINS, STAN MARGUILIES,
BRANDON STODDARD, AMERICAN BROADCASTING COM-
PANIES, INC., a New York corporation, and BANTAM
BOOKS, INC., a Delaware corporation, Jointly and
Severally,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ANTHONY AUGUSTUS MURASKI
MURASKI & SIKORSKI
300 North Fifth Avenue
Suite 240
Ann Arbor, MI 48104
(313) 761-5100

Counsel for Petitioners
Charles A. Silva and
Living Waters Publishing
and Distributing, Inc.



QUESTION PRESENTED

A. Does the First Amendment's embodiment in the Copyright Act and the copyright and patent clause of the Constitution, Article 1, Section 8, Clause 8, require a court of appeal to conduct a *de novo* review or an independent examination of the entire record, where the determination of copyright infringement rests solely on a comparison of the works in issue?

[Note: Petitioner reserves the right to argue Question B in the event certiorari is granted on the above question, but does not include Question B with the reason for the grant of certiorari.]

B. Does a court of appeals abuse its discretion in making a review of the record to determine the issue of similarity, in an action of copyright infringement, when it affirms the district court's subsequent findings that: plaintiff had not stated a cause of action of unfair competition, though the evidence supported that defendant had misled the court; plaintiff's claims were barred by laches, when there is no showing that defendant was prejudiced; and plaintiff's claims were barred by a grant of an oral non-exclusive license, without making a determination if defendant's conduct itself exclusively controlled plaintiff's work, without the required writing, particularly where pretrial discovery as to these issues has not been completed?

LIST OF PARTIES

The only parties to the proceedings below were the petitioners Charles A. Silva and Living Waters Publishing and Distributing, Inc., and the respondents Shirley MacLaine, Colin Higgins, Stan Margulies, Brandon Stoddard, American Broadcasting Companies, Inc. and Bantam Books, Inc.

Petitioner Living Waters Publishing and Distributing, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS OF THE COURT BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR ALLOWANCE OF THE WRIT	8
THE SCOPE OF REVIEW OF A DISTRICT COURT'S FINDINGS OF FACTS AS TO THE ISSUE OF SUBSTANTIAL SIMILARITY OF COPYRIGHTED WORKS, ACCORDED CONSTITUTIONAL PROTECTION, IS AN ISSUE OF GREAT IMPORTANCE OVER WHICH APPELLATE COURTS ARE IN CONFLICT	10
CONCLUSION	15
APPENDIX:	
Order and Opinion of the United States Court of Appeals for the Sixth Circuit Dated November 7, 1989	1a
Opinion of the United States District Court for the Eastern District of Michigan, Southern Division Dated July 27, 1988	3a
Order of the United States District Court for the Eastern District of Michigan, Southern Division Dated August 22, 1988	18a
Order Denying Petition for Rehearing En Banc, of the United States Court of Appeals for the Sixth Circuit Dated December 21, 1989	20a

TABLE OF AUTHORITIES

CASES:	Page
Anderson v. City of Bessemer City, 470 U.S. 564 (1985)	8
Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548 (2nd Cir. 1984)	10
Alliotti v. R. Dakin & Co., 831 F.2d 898 (9th Cir. 1987)	13
Cooling Systems & Flexibles, Inc. v. Stuart Radiator, Inc., 777 F.2d 485 (9th Cir. 1985)	13
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981)	11
Franklin Mint Corp. v. Nat. Wildlife Art Exchg., 575 F.2d 62 (3rd Cir. 1978)	13
Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985)	9, 10, 11, 14
Harte Hanks Communications, Inc. v. Connaughton, — U.S. —, 109 S.Ct. 2678 (1989)	9
Hartman v. Hallmark Cards, Inc., 833 F.2d 117 (8th Cir. 1987)	6, 13
Ideal Toy Corp. v. Fab-Lu Limited, 369 F.2d 1021 (2d Cir. 1966)	8
International Luggage Registry v. Avery Products Corp., 541 F.2d 830 (9th Cir. 1976)	8
John Hancock, Inc. Co. v. Bartels, 308 U.S. 180 (1939)	12
Litchfield v. Spielberg, 736 F.2d 1353 (9th Cir. 1984), <i>cert. denied</i> , 470 U.S. 1052 (1985)	6, 11
Malden Mills, Inc. v. Regency Mills, Inc., 626 F.2d 1112 (2nd Cir. 1980)	13
Manufacturers Hanover Trust v. Drysdale Sec. Corp, 801 F.2d 13 (2d Cir. 1986), <i>cert. denied sub nom.</i>	8
Marks v. United States, 430 U.S. 642 (1982)	11
McElroy v. United States, 455 U.S. 642 (1982)	11
Mikalek Corporation v. State of Michigan, 814 F.2d 290 (6th Cir. 1987)	11
Original Appalachian Artworks, Inc. v. Toy Loft, 684 F.2d 821 (11th Cir. 1982)	7, 12
Scarborough v. United States, 431 U.S. 563 (1977)	12

TABLE OF AUTHORITIES—Continued

	Page
Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2nd Cir.), <i>cert. denied</i> , 298 U.S. 669 (1936) ..	11
Sherry Mfg. Co. v. Towel King of Florida, Inc., 753 F.2d 1565 (11th Cir. 1985)	12
Sid & Marty Kroft Television v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977)	1, 6, 14
Strauss v. Stratojac Corp., 810 F.2d 679 (7th Cir. 1987)	8
United States v. United States Gypsum Co., 333 U.S. 364 (1948)	8
Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3rd Cir. 1975)	13

CONSTITUTION:

United States Constitution:

Article I, Section 8, Clause 8	2
Amendment I	2, 9, 13, 14

STATUTE:

Copyright Act of 1976, Title 17 U.S.C., 90 Stat. 2541 et seq., Public Law 94-553	2
Section 106	2
Section 204	3, 7
Section 505	7

RULES:

Fed. R. Civ. P. 52 (a)	12
Fed. R. Civ. P. 56	12

OTHER AUTHORITIES:

William F. Patry, Latman's The Copyright Law, 6th Ed., BNA (1986)	11
--	----



IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. _____

CHARLES A. SILVA and LIVING WATERS PUBLISHING
AND DISTRIBUTING, INC.,

Petitioners,

v.

SHIRLEY MACLAINE, COLIN HIGGINS, STAN MARGUILIES,
BRANDON STODDARD, AMERICAN BROADCASTING COM-
PANIES, INC., a New York corporation, and BANTAM
BOOKS, INC., a Delaware corporation, Jointly and
Severally,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINIONS OF THE COURTS BELOW

The Opinion and Order of the United States Court of Appeals for the Sixth Circuit, dated November 7, 1989, is unreported and is reproduced in the Appendix, A. 1a-2a. The Opinion of the United States District Court for the Eastern District of Michigan, Southern Division, dated July 27, 1988, is reported at 697 F. Supp. 1423 and is reproduced in the Appendix. A. 3a-17a. The Order of the United States District Court for the Eastern Dis-

trict of Michigan, Southern Division, dated August 22, 1988, is unreported and is reproduced in the Appendix. A. 18a-19a. The Order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing En Banc, dated December 21, 1989, is unreported and is reproduced in the Appendix. A. 20a.

JURISDICTIONAL STATEMENT

The Order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petition for Rehearing En Banc, is dated December 21, 1989.

This Honorable Court has jurisdiction by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following provisions of the Constitution of the United States:

Article I, Section 8, Clause 8:

The Congress shall have Power * * * to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Amendment I:

Congress shall make no law * * * abridging the freedom of speech * * *

This case involves the Copyright Act of 1976, Title 17 U.S.C., 90 Stat. 2541 et seq., Public Law 94-553:

Section 106. Exclusive Rights in Copyrighted Works:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

* * * *

Section 204. Execution of Transfers of Copyright Ownership:

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

STATEMENT OF THE CASE

Petitioners Charles A. Silva ("Silva") and Living Waters Publishing and Distributing, Inc. ("Living Waters") seek certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit which affirmed the dismissal of their copyright infringement action by the United States District Court for the Eastern District of Michigan, Southern Division. On December 21, 1989 the United States Court of Appeals for the Sixth Circuit denied Petitioners' Petition for Rehearing En Banc of its decision to affirm. A. 20a.

In 1977 Charles A. Silva copyrighted and published a book entitled, *Date with the Gods*. This work presented

Silva's views on metaphysical phenomena, as compiled from other sources, and a unique story of a character named Rama. This story of Rama took place in Peru, and Silva represented Rama as an extraterrestrial. Further, Silva writing in the first person, has a relationship with Rama, in which Rama acts as a "spiritual guide" to Silva, teaching him about said phenomena.

It is undisputed that sometime in 1977 Shirley MacLaine ("MacLaine") obtained a copy of *Date with the Gods* from Silva, and forged an informal relationship with Silva; whereby she travelled with Silva in Peru. While in Peru, MacLaine and Silva identified certain geographical areas which Silva spoke about in his book. A. 7a.

In 1983, MacLaine published a book entitled, *Out on a Limb*. It is undisputed that certain sections of MacLaine's work is based upon discussions with Silva. While MacLaine does not admit that these discussions were based on Silva's work itself, all logical inferences and permissible presumptions point to that conclusion. A. 7a.

In MacLaine's work she wrote, in part, about an extraterrestrial character named Mayan who travelled, in Peru, with a character named David. In *Out on a Limb*, Mayan acted as a "spiritual guide" to David, in which she revealed to David her understanding of metaphysical phenomena. MacLaine has viewed the character, David, as "one of the central characters" of her work and it is uncontroverted that MacLaine based her character, David, at least, in part, upon Silva's personality. A. 7a.

Between the years 1977 and 1983 there is a dispute of facts between Silva and MacLaine concerning what authority he may have given her to use his work, *Date with the Gods*, for not only in MacLaine's book, *Out on a Limb*, but in a 1987 American Broadcasting Companies' television film adaptation of *Out on a Limb*. However, it is undisputed that there exists no written contract

whereby Silva empowered MacLaine or her agents to make exclusive use of his work.

Further, it is undisputed that, while MacLaine acknowledges some thirty authors and their works in her book, *Out on a Limb*, seeking permission from some to publish excerpts of their works, she absolutely makes no reference to Silva's work, *Date with the Gods*, in *Out on a Limb*.

MacLaine through her agent Bantam Books, effectively stopped Silva from lecturing throughout the United States, with threats of legal action, if Silva associated himself with the character "David" in *Out on a Limb* or associated himself with MacLaine employing her likeness in lecture materials and advertisements.

On December 17, 1987, Silva and Living Waters, filed a copyright infringement action in the United States District Court for the Eastern District of Michigan, Southern Division, naming, among others, Shirley MacLaine, Bantam Books, and American Broadcasting Companies, as defendants.

On April 15, 1988 the defendants filed their Motion for Summary Judgment, pursuant to the Federal Rules of Civil Procedure Rule 56.

Silva and Living Waters, in response to defendant's motion for summary judgment argued that:

(1) since MacLaine had admitted access to Silva's work prior to writing her work, she was estopped from claiming that her work was an independent creation;

(2) an ordinary lay observer, in reading both works, would find that defendants' work was substantially similar to and infringed Silva's work, in that, the characters Rama and Mayan were similar as to physical features, style and content of speech, lifestyle and experiences, and that MacLaine's work took the heart of Silva's work employing the same plot, themes, scenes, characters and in the same sequences of events as in Silva's work;

(3) MacLaine's use of Silva's work violated the doctrine of fair use; and

(4) defendants' conduct in the use of Silva's work in derivative forms, by effectively stopping him from promoting his work, and by not acknowledging that MacLaine used his work in creating her work, infringed Silva's copyright and acted to exclusively control his work without an express written agreement.

On July 27, 1988 the District Court granted defendants their motion for summary judgment in which the District Court gave its opinion from the bench. A. 3a-17.

Silva and Living Waters appealed the District Court's Orders, granting defendants' summary judgment and attorneys' fees and costs to the United States Court of Appeals for the Sixth Circuit.

Petitioners argued on appeal before the United States Court of Appeals for the Sixth Circuit that the District Court's analysis of the works amounted to an impermissible dissection of similarity of expression, and further argued that because of the subjective nature of an analysis of hundreds of pages of literary works, the District Court should have adopted a more detailed two-step standard of review of substantial similarity known as the extrinsic/intrinsic test.¹

¹ Petitioners have argued that the District Court's standard of review was inappropriate in that it did not perform the detailed two-step, extrinsic/intrinsic analysis of *Sid & Marty Kroft Television v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977); *Litchfield v. Spielberg*, 736 F.2d 1352, 1356-1357 (9th Cir. 1984), and as recently adopted by the Eighth Circuit Court of Appeals in *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117 (8th Cir. 1987). The "extrinsic test" is objective; it depends not on the response of the trier of fact, but on specific criteria which can be listed and analyzed. Such criteria, include the type of artwork involved, the materials used, the subject matter, and the setting for the subject. Since it is an extrinsic test, analytic dissection and expert testimony are appropriate. The "extrinsic test" compares the individual fea-

Further, Petitioner's argued that the proper scope of appellate review of the District Court's findings of fact was *de novo* and that the Court of Appeals should make its own independent examination of the literary works.

In a two line opinion, the United States Court of Appeals for the Sixth Circuit, on November 7, 1989, affirmed the District Court's Order granting summary judgment to defendants.² A. 1a-2a.

tures of the works; it looks to find specific, articulable similarities between the plot, theme, dialogue, mood, setting, pace, characters, and sequences of events. The second part of the substantial similarity inquiry, the "intrinsic test", is used to determine whether two works are substantially similar in their "forms of expression". The "intrinsic test" is subjective; it depends solely "on the response of the ordinary reasonable person". To that extent, expert testimony or the comparison of individual features of the works is inappropriate in applying the "intrinsic test". Rather, the trier of fact ordinarily decides whether the "total concept and feel" of the two works is substantially similar. In comparing two films, for example, or a film with a written work, the proper question in applying the "intrinsic test" is whether the ordinary, reasonable audience would recognize the defendant's work as a "dramatization" or "picturization" of the plaintiff's work. To prevail on a copyright claim, a plaintiff must show substantial similarity of *both* ideas and expression.

² The Sixth Circuit Court of Appeals also found that the District Court had abused its discretion when it awarded attorney's fees and costs, pursuant to 17 U.S.C. § 505 to defendants applying the "even handed" analysis of *Original Appalachian Artworks v. McCall Pattern Co.*, 825 F.2d 335 (11th Cir. 1987), because "Silva was reasonably justified in commencing the instant lawsuit". Petitioner's raised other issues on appeal concerning whether defendants had obtained an oral exclusive license to use Silva's work in violation of § 204 of the Copyright Act of 1976; whether defendants' laches claim should fail because there was no showing of prejudice, and whether Petitioner's unfair competition claim stated a separate cause of action from its claim of copyright infringement. However, while the Court of Appeals addressed these issues in oral argument, it was silent in its opinion regarding these issues and Petitioners' submit that these issues are still reserved for a final decision by the Sixth Circuit Court of Appeals, depending upon whether this Court grants certiorari.

On December 21, 1989 the United States Court of Appeals for the Sixth Circuit denied Petition for Rehearing En Banc.

REASONS FOR ALLOWANCE OF THE WRIT

Courts of Appeals have held that the issue of "substantial similarity" is a finding of fact. *International Luggage Registry v. Avery Products Corp.*, 541 F.2d 830, 831 (9th Cir. 1976); *Ideal Toy Corp. v. Fab-Lu Limited*, 360 F.2d 1021, 1022 (2d Cir. 1966).

A Court of Appeals scope of review of a District Court's finding of facts is according to a clearly erroneous standard. The appellate court, in making its determination, reviews the record in its entirety, including briefs of the parties and arguments of counsel.³ Said review is not an independent review of the entire record or a *de novo* review.

In performing this scope of review appellate courts weigh heavily in favor of the District Court's findings of fact.⁴ This Court in *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) has held that where the fact-finder has a choice between two permissible views of the evidence, the view chosen cannot be held to be clearly erroneous.

If no error is found in the District Court's fact findings the Court of Appeals will affirm said court's rulings,

³ In *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) this Court characterized the clearly erroneous standard as follows: "A finding is 'clearly erroneous' when although there is evidence to support it, *the reviewing court on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." (Emphasis added.)

⁴ The "clearly erroneous" scope of review applies equally to factual findings of a judge in a bench trial or in a jury disposition, *Strauss v. Stratovac Corp.*, 810 F.2d 679, 685 (7th Cir. 1987); *Manufacturers Hanover Trust v. Drysdale Sec. Corp.*, 801 F.2d 13, 27 n.8 (2d Cir. 1986), *cert. denied sub nom.*

as a matter of law; thus adopting, as its own, the factual analysis and reasons stated in the District Court's opinion.⁵

Courts of Appeals, in reviewing copyright infringement actions, are in conflict as to what is the appropriate scope of review, the clearly erroneous standard or the *de novo* standard.

This Court in *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 558-560 (1985) reasoned that the Framers of the Constitution intended that copyright itself "to be the engine of free expression" and viewed that the First Amendment was embodied in the Copyright Act's distinction between expression and idea, and has recognized that copyright owners have valuable properties to protect and should expect a "fair return" for their creative labors.

In *Harte Hanks Communications, Inc. v. Connaughton*, — U.S. —, 109 S.Ct. 2678 (1989) this Court continued its mandate to require the appellate courts to conduct an independent examination of the entire record or a *de novo* review of district court proceedings of First Amendment actions.

This case raises the important issue as to whether this Court should similarly mandate that the appellate scope of review of summary judgments in copyright infringement actions should be an independent examination of the entire record or a *de novo* review, in order to ensure the balance between First Amendment rights of free expression and the valuable property rights protected by copyright.

⁵ It is clear that the Sixth Circuit Court of Appeals, in the case at bar, in its two line opinion, has applied a "clearly erroneous" scope of review. There is no evidence in the record that said court has made its own independent review of the record or a *de novo* review of works of Silva and MacLaine, when it summarily has adopted the District Court's findings of facts and reasoning.

THE SCOPE OF REVIEW OF A DISTRICT COURT'S FINDINGS OF FACTS AS TO THE ISSUE OF SUBSTANTIAL SIMILARITY OF COPYRIGHTED WORKS, ACCORDED CONSTITUTIONAL PROTECTION, IS AN ISSUE OF GREAT IMPORTANCE OVER WHICH APPELLATE COURTS ARE IN CONFLICT.

In a copyright infringement action the plaintiff has the burden of proving that a defendant had access to the copyright work and the work of defendant is substantially similar to plaintiff's work. *Sid & Marty Kroft Television v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977).

In this case, access is not at issue for MacLaine admits access to Silva's work and discussing his work with him, six (6) years prior to the publication of her own work in 1983. A. 7a.

Further, MacLaine has not offered any proof that she independently created her work before having access to Silva's work, and according to *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2nd Cir. 1984) *cert. denied*, 469 U.S. 982 (1984) :

(T)he more convincing the proof of access by the copier, the assumed copier (of) plaintiff's work, the less impressive the similarities have to be to support a conclusion of copying.

738 F.2d at 554.

Silva having established MacLaine's access to his work, presented his proofs of substantial similarity to the District Court to establish that she had wrongfully infringed his work. Substantial similarity requires that the infringement be substantial and material enough, either quantitatively or qualitatively to constitute unlawful appropriation. See, *Harper & Row, supra*, 471 U.S. at 564-565.

While the view has been expressed that mathmatically adding up the amount of differences between the copy-

righted material and the alleged copy has been used to defeat a copyright infringement claim⁶, this Court in *Harper & Row, supra*, 471 U.S. at 566 has rejected this view, adopting Judge Learned Hand's perspective, as reported in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2nd Cir.), *cert. denied*, 298 U.S. 669 (1936), that:

. . . no plagiarist can excuse the wrong by showing how much of his work he did not pirate.

Summary judgment has been disfavored in copyright cases involving the close issue of fact to resolve the issue of substantial similarity. *Litchfield v. Spielberg*, 736 F.2d 1353, 1355-1356 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985). According to one commentator, because of the necessarily subjective nature of infringement determinations, "the philosophy of a reviewing court can be important." See, William F. Patry, *Latman's The Copyright Law*, 6th Ed., BNA (1986) at 202.

There is a conflict between decisions of Courts of Appeals and between decisions of same Court of Appeals concerning the scope of review of copyright infringement cases.

One purpose of certiorari jurisdiction of this Court is to bring about uniformity of decisions on matters of federal law. See *McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the Circuits on the issue of statutory construction"); *Marks v. United States*, 430 U.S. 642 (1982) (certiorari granted "to resolve a conflict in the Circuits"); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981) (certiorari granted "to resolve a conflict among the Circuits on the appealability question" as to certain district

⁶ The District Court has adopted this view in its finding of no substantial similarity between Silva and MacLaine's works, relying on *Mikalek Corporation v. State of Michigan*, 814 F.2d 290, 294-295 (6th Cir. 1987). A. 9a-10a.

court decisions); *John Hancock, Inc. Co. v. Bartels*, 308 U.S. 180, 181 (1939) (certiorari granted because of intracircuit conflict and the importance of the question); *Scarborough v. United States*, 431 U.S. 563, 567 n.4 (1977) (certiorari granted because of "split among the Circuits", one circuit being noted as having an intra-circuit conflict).

The conflict between Courts of Appeals and among panels of the same Court of Appeals with respect to the scope of review of District Court decisions promotes the practice of "forum shopping", especially in cases involving federal law where a party could bring its action in Federal District Courts in various regions around the United States.⁷

Courts of Appeals have reviewed District Court's findings of fact of substantial similarity employing clearly erroneous and *de novo* scopes of review.⁸ *Original Appalachian Artworks, Inc. v. Toy Loft*, 684 F.2d 821, 825 (11th Cir. 1982) (trial court's findings of fact of "substantially different" was supported by a review of the exhibits and record and was not clearly erroneous); *Sherry Mfg. Co. v. Towel King of Florida, Inc.*, 753 F.2d 1565, 1569 n.6 (11th Cir. 1985) (where the appellate court has the opportunity to view for itself the same ex-

⁷ A plaintiff in a copyright infringement case can bring an action in any Federal District Court in the United States if the defendant did business in these various venues. In cases, such as the one at bar, Silva could have brought his action against MacLaine in all regions of the United States because MacLaine is a nationally known person who markets her books and films nationwide.

⁸ Some District Courts make the distinction as to choice of scope of review depending upon whether they are ruling under Fed. R. Civ. P. 52(a), which requires a clearly erroneous standard of review, or under Fed. R. Civ. P. 56, which requires a *de novo* standard of review. However, the differences between these two rules are blurred when the sole question of fact is whether two works are substantially similar in expression, based solely upon review of the works themselves.

hibits as the trial court, the rationale for applying the clearly erroneous standard disappears); *Cooling Systems & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 487 (9th Cir. 1985) (findings of fact made by a judge after a bench trial are subject to the "clearly erroneous" standard of review); *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 900 (9th Cir. 1987) (the district court's grant of summary judgment on the copyright claims is subject to *de novo* review); *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 121 (8th Cir. 1987) (court reviewed the record including an independent review of the copyrighted works); *Franklin Mint Corp. v. Nat. Wildlife Art Exchg.*, 575 F.2d 62, 66 (3rd Cir. 1978) (trial court's finding of no copying, based on the testimony of the artist and other evidence of creativity, may be overturned only if it is clearly erroneous); *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904 (3rd Cir. 1975) (since no question of credibility is involved, the Court of Appeals is in as good a position to determine the question as is the district court); *Malden Mills, Inc. v. Regency Mills, Inc.*, 626 F.2d 1112, 1113 (2nd Cir. 1980) (it is settled in the circuit that an appellate court will exercise powers of *de novo* review in deciding substantial similarity).

Petitioners submit that this Court in determining the scope of review of copyright cases concerning substantial similarity should base its decision on the nature of the rights being protected and not upon the type, quality or form of the evidence being reviewed.

Copyright infringement cases, involving questions of substantial similarity which embodies the First Amendment, warrant the same standard, an independent review of the record or a *de novo* review, as cases involving First Amendment questions of free expression.⁹

⁹ Petitioners have fully developed this reasoning in its "Reasons for Allowance of the Writ". Petitioners are not suggesting that there is a First Amendment defense to substantial similarity of expression. Petitioners submit that because of the sensitive Con-

Petitioners argue that the District Court, in making its finding of facts, of substantial similarity, merely dissected the works at issue, trivialized the similarities between the works, and did not make a complete finding as to whether MacLaine's work was substantially similar to Silva's work through similarities in treatment, details, scenes, events and characterization.¹⁰

Petitioners submit that had the Court of Appeals made a *de novo* review of substantial similarity between the works, it would have found that MacLaine's work was substantially similar to Silva's work.¹¹

stitutional balance between copyright protection and First Amendment rights, *de novo* review is warranted, especially in cases like this where Respondents have raised the defense of "fair use".

¹⁰ According to *Sid & Marty Kroft Television v. McDonald's Corp.*, 562 F.2d 1157, 1169 (9th Cir. 1977): "Lest we fall prey to defendants' invitations to dissect the words, however, we should remember that it is the combination of any different elements which may command copyright protection because of its particular subjective quality. (citations omitted) While any one similarity taken by itself seems trivial, I cannot say at this time that it would be improper for a jury to find that the over-all impact and effect indicate substantial appropriation."

¹¹ Petitioners submit that MacLaine's work, *Out on a Limb*, has taken the "heart" out of Silva's work, *Date with the Gods*. This Court in *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 564-565 (1985), in adopting Judge Learned Hand's reasoning, agreed with the district court's analysis that "(T)he Nation took what was essentially the heart of the book." On appeal to the Sixth Circuit Court of Appeals Petitioners argued that in its *de novo* review the Sixth Circuit Court of Appeals in adopting the extrinsic/intrinsic test it would find that MacLaine's work, the book and the film, produced and broadcasted by American Broadcasting Companies, was a "dramatization" or "picturization" of Silva's work and that the "total concept and feel" of the two works were substantially similar. See Note 1.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY AUGUSTUS MURASKI
MURASKI & SIKORSKI
300 North Fifth Avenue
Suite 240
Ann Arbor, MI 48104
(313) 761-5100

Counsel for Petitioners
Charles A. Silva and
Living Waters Publishing
and Distributing, Inc.

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 88-1968/89-1038

CHARLES A. SILVA AND LIVING WATERS PUBLISHING
AND DISTRIBUTING, INC.,
Plaintiffs-Appellants,

v.

SHIRLEY MACLAINE, COLIN HIGGINS, STAN MARGUILIES,
BRANDON STODDARD, AMERICAN BROADCASTING COMPANIES, INC. and BANTAM BOOKS, INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan

Decided and Filed Nov. 7, 1989

BEFORE: KRUPANSKY and WELLFORD, Circuit
Judges; and CELEBREZZE, Senior Circuit
Judge

PER CURIAM. Plaintiffs-appellants Charles A. Silva (Silva) and Living Waters Publishing and Distributing Co., Inc. (Living Waters) have appealed from the district court's grant of summary judgment in favor of defendants-appellees, Shirley MacLaine, *et al.*¹ (collectively re-

¹ The other defendants-appellees are Bantam Books, Inc., publisher of MacLaine's book, American Broadcasting Companies, Inc., producer of a television film version of MacLaine's work. Colin Higgins, Stan Margulies and Brandon Stoddard participated in the production of the film.

ferred to as defendants) in this copyright infringement action. Silva, author of *Date With the Gods*, initiated this action against defendants alleging that MacLaine's book, *Out On A Limb*, and subsequent movie, also entitled *Out On A Limb* (broadcast in January, 1987), infringed on his copyright of *Date With the Gods*.

Upon review of Silva's assignments of error, the record in its entirety, the briefs of the parties and the arguments of counsel, this court concludes that, as a matter of law, Silva has not demonstrated that his book, *Date With the Gods* was substantially similar to MacLaine's *Out On A Limb*. Accordingly, the summary judgment in favor of the defendants is AFFIRMED for the reasons stated in the district court's opinion of July 27, 1988. *Silva v. MacLaine*, 697 F. Supp. 1423 (E.D. Mich. 1988).

Silva has also appealed the district court's award of attorney's fees in the amount of \$27,881.25 and costs in the amount of \$2,298.92, pursuant to 17 U.S.C. § 505. This court concludes that the district court abused its discretion in awarding attorney's fees and costs pursuant to § 505, because Silva was reasonably justified in commencing the instant lawsuit. *See Trapani v. CBS Records*, 857 F.2d 1475 (6th Cir. 1988) (unpublished per curiam); *Original Appalachian Artworks v. McCall Pattern Co.*, 825 F.2d 335 (11th Cir. 1987). Accordingly, the district court's award of attorney's fees and costs is REVERSED.

A TRUE COPY.

Attest:

LEONARD GREEN
Clerk

/s/ Sharon R. Tallaige
Deputy Clerk

Issued as Mandate: January 9, 1990

Costs: None

UNITED STATES DISTRICT COURT
E.D. MICHIGAN, S.D.

No. 87-4508

CHARLES SILVA,
v. *Plaintiff,*
SHIRLEY MACLAINE,
Defendant.

July 27, 1988

Anthony Muraski, Detroit, Mich., for plaintiff.

Herschel Fink, Detroit, Mich., for defendant.

GILMORE, District Judge.

This is an action brought by the Plaintiff against Defendant claiming copyright infringement under 17 U.S.C. § 101 and following in one count and unfair competition in the other count. The Plaintiff alleges that Defendant Shirley MacLaine's book, "Out On a Limb", and the subsequent televised film version of the book infringed their copyright in Plaintiff Chales Silva's book "Date With The Gods." The unfair competition claim stems from a letter by the Defendant threatening to sue Plaintiff Silva as a result of his claiming that that he is a certain character "David" in MacLaine's name and picture to promote lectures and the like.

The Plaintiffs are the author Silva and Living Waters Publishing and Distributing Company, the assignee of all

of Silva's rights in "Date." The Defendants are MacLaine, Bantam Books which published "Out On a Limb," American Broadcasting Company which produced the television version, and three other individuals who participated in the television version.

We are here on Defendant's motion for summary judgment and technically, I guess, you would say there might be cross motions for summary judgment since the Plaintiff denominates their response to Defendant's motion as an answer to Defendant's motion for summary judgment and is the alternative Plaintiff's motion for summary judgment.

Defendant claims six independent bases for granting summary judgment: Lack of substantial similarity, fair use, the granting by Silva to MacLaine of an oral non-exclusive license in "Date With the Gods," laches, equitable estoppel, and the reference to the second count for unfair competition, a claim of preemption of the copyright law and also failure to state a claim.

We start with "Date With the Gods." This was written by Plaintiff Silva, published in 1977 and republished in 1987, with some minor changes, after Silva assigned all his rights in the work. "Out On a Limb" was published by Defendant MacLaine in 1983 by Defendant Bantam Books and the film version was televised in January 1987.

Silva's book, "Date with the Gods," is about Silva's experiences in Peru in the 1970's. He tells of his encounters with an extraterrestrial woman high in the Andes and his visits with her to the healing mineral baths. The book is mainly a running account of the dialogue between Silva and this extraterrestrial, whose name is Rama.

There are several overriding themes to the conversations and therefore Silva's book itself. Proof of the existence of UFO's and visits to earth by extraterrestrial beings from the beginning of time is one of these over-

riding themes and indeed Silva briefly recounts several rides with Rama in a UFO called a Vimana. In many of their conversations, Rama points to specific portions of the Bible as evidence of UFO's and extraterrestrials visiting the earth, for example, stories about "chariots of fire."

Another topic in the book is the composition of one's spirit. Rama explains that the spirit is made up of ananas and amonites which are theoretical particles in the space between the neutron, proton, and electron of an atom and which holds the atom together. According to her, as recounted by Silva, a person can voluntarily separate his spirit, composed of these ananas and amonites, from his physical body and engage in out of body travel in the world and in outer space. This phenomenon is referred to as astral projection.

Although reincarnation is not discussed in detail there is the definite implication in "Date With The Gods" that when one dies, his spirit might become embodied in another living form. The difference between astral projection and death is that in astral projection a silver cord keeps the spirit attached to the physical body, and once the experience is over, the spirit returns to the body and life continues as before. In death, the silver cord is severed.

Finally, Rama placed heavy emphasis on the tenets that one should love God and love others as one loves oneself. Again, there are many specific references in "Date With the Gods" to the Bible and the teachings of Jesus Christ. The Book of Revelations is heavily emphasized. Another overriding theme in "Date With The Gods" is that the end of the world is soon approaching; there will be an Armageddon; and those persons to be saved will only be a chosen 144,000 who have come to accept the teachings of God and Jesus Christ as set forth by the extraterrestrial Rama in "Date."

Now MacLaine's book, "Out On A Limb", is her personal story of her voyage of self-discovery during her forties and her quest for spiritual understanding. In the course of this quest MacLaine describes an affair she had with a prominent British politician. Although one theme of the book is that there are spiritual explanations for one's lifetime experiences including problems in personal relationships, for example, that two lovers had known one another or perhaps had been enemies in a previous lifetime, much of the book recounts her affair and her travels to various parts of the world as she learns more about the spirit world. This includes MacLaine's encounter with "trance mediums" which are the same as or at least similar to psychics. A trance medium is a person who is inhabited by an unembodied spirit, that is, a person who has died but has not reincarnated and who becomes an instrument through which the spirit expresses itself and carries messages to those who consult it. MacLaine recounts her consultations with various trance mediums, a practice known as channeling, to obtain information about herself and previous incarnations. MacLaine's book focuses heavily on the theory of reincarnation and this takes her into the theory that is contained in "Date With The Gods", that a person's spirit is the same as what composes the spaces between the neutron, proton and electron of an atom, and that one can separate one's spirit from one's physical body, the two remaining attached by a silver cord. As does Silva in "Date With The Gods", MacLaine recounts her experiences with astral projection.

MacLaine, as did Silva, at Rama's direction read numerous works by other authors and discussed these various topics with others in her exploration of and quest to substantiate the spiritual world. It is undisputed that among the people MacLaine talked to during the years of research was Silva and among the books she read was "Date With The Gods".

The facts also show that in 1977 MacLaine traveled in the Andes of Peru with Silva and that a portion of the book recounts these travels and her conversations with Silva. She does not use Silva's name in "Out On A Limb", but she refers to a character named David throughout the book as a spiritual guide and as the person with whom she traveled in Peru. In the introduction to "Out on a Limb" MacLaine explicitly states: "Some of the people who appear in this book are presented as composite characters in order to protect their privacy and the sequence of some of the events is adapted accordingly. But all events are real." In the lawsuit MacLaine takes the position that David is one of these composite characters and Silva is not David but only a part of David. In the book David takes MacLaine to the same part of the Andes in which Silva traveled and tells her of his encounter with an extraterrestrial woman who MacLaine refers to as Mayan.

Now it is true that in 1977 Silva sent MacLaine a copy of "Date With The Gods" unsolicited. It is undisputed that she discussed it with him and ultimately traveled with him to the Andes. It is undisputed that he encouraged her "to provide wide dissemination of some of the ideas that" they had discussed. Eventually she wrote "Out On A Limb" and sent a 700 page draft of the manuscript to Silva, and he responded with a three page handwritten letter offering suggestions and comments. She said at that time, and this was in 1981, that she made it clear that she meant to publish and she relied in part on some of the comments and suggestions of Silva and on some of his descriptions of events.

In other words, after the trip, after the drafting of the original manuscript by MacLaine, Silva reviewed it in 1981 and, as I say, made these suggestions and made suggested corrections in the book. The book, "Out On A Limb", was published in 1983 and MacLaine gave Silva an autographed copy of the book which became a best seller. In 1985 she told Silva she was working on a tele-

vised version of "Out On A Limb" and she kept him informed of its progress during 1986. Until the service of the Complaint in this action, which was filed in 1987, December, the end of 1987, Silva never made any objections of any kind known to MacLaine.

Now it is also undisputed that in promoting his book, "Date With The Gods", Silva has represented himself as David in MacLaine's book, "Out On A Limb", and he has also used MacLaine's name and likeness and the covers of her book in his promotional endeavors. And it was the result of that that a letter was sent on November 19, 1986 by general counsel of Bantam warning that the Defendants considered actionable the actions of the Plaintiff and demanded that Silva discontinue misrepresenting himself as David and his advertising by using the cover of Bantam's publication "Dancing In The Light" and by the appropriation of MacLaine's name and likeness for commercial purposes. Now that letter, in which the Defendant warns Plaintiff to stop doing the things they were doing, is the basis for the second count of Plaintiff of unfair competition.

It is Plaintiff's basic claim that the similarities between "Date With The Gods" and "Out On A Limb" and the subsequent film amount to copyright infringement. And, as I say, in the other count they sue for unfair competition.

Now the basic argument of the Defendant is there is not sufficient similarity between the two works as a whole to support a copyright infringement action and the Court may therefore grant a summary judgment for Defendant on the claim of copyright infringement. I think we will begin with the basic proposition that "a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not to the idea itself. . . ." The Supreme Court pointed that out some 34 years ago in *Mazer v. Stein*, 347 U.S. 201, 217,

74 S.Ct. 460, 470, 98 L.Ed. 630. In *Mazer* the Court gave as an example:

“Thus, in *Baker v. Selden*, 101 US 99, [26 L.Ed. 841] the Court held that a copyrighted book on a peculiar system of bookkeeping was not infringed by a simliar book using a similar plan which achieved similar results where the alleged infringer made a different arrangement of the columns and used different headings.”

And the Court emphasized that:

“The copyright protects originality rather than novelty or invention—conferring only the sole right of multiplying copies. Absent copying there can be no infringement of copyright.”

Now in the Sixth Circuit the Court has not shied from affirming summary judgment in copyright cases on the grounds of lack of substantial similarity. A leading case on the subject is *Mikalek Corporation v. State of Michigan* and another one is *Wickham v. Knoxville*. The *Mikalek* case is 814 F.2d 290, a 1987 case from the Sixth Circuit, remanded on other grounds at 821 F.2d 327, and the *Wickham* case is *Wickham v. Knoxville*, 739 F.2d 1094, a 1984 case in the Sixth Circuit.

Now in *Wickham* the Court affirmed summary judgment for the Defendant where the Plaintiff alleged substantial similarities amounting to copyright infringement between Plaintiff’s architectural drawings for a tower structure and the design of the tower structure that was eventually constructed by the Defendant at the Knoxville World’s Fair. The Sixth Court made clear at Page 1097 that:

“A Court may compare the two works and render a judgment for the Defendant on the ground that as a matter of law, a trier of fact would not be permitted to find substantial similarity.”

The Court explained that there are two essential elements to a copyright case: Ownership of the copyright by the Plaintiff and copying by the Defendant, and that to prove copying by the Defendant the Plaintiff must prove access as well as substantial similarity. The cases make clear that regardless of access, Plaintiff must demonstrate substantial similarity. It simply need not be a striking similarity but substantial similarity.

Also in *Mikalek*, where the Court affirmed summary judgment for the Defendant on the grounds that there was no substantial similarity between Plaintiff's and Defendant's public relations program for the State of Michigan, and it was subsequently remanded on another issue which does not affect the ruling just mentioned, the Court emphasized in that case that the burden is on Plaintiffs to prove substantial similarity between the copyrighted material and the allegedly infringing material, and the Court attempted to clarify the basic rule that protection is given only to the expression of the idea, not the idea itself. It said at page 294:

"While the demarcation between idea and expression may not be susceptible to overly helpful generalization, it has been emphasized repeatedly that the essence of infringement lies in taking not a general theme but its particular expression through similarities of treatment, details, scenes, events and characterization."

The Court also said on page 295:

"A finding of substantial differences between the copyrighted material and the alleged copy has been found to justify a judgment for the Defendant in copyright infringement proceedings.

"Finally, as a matter of logic as well as law, the more numerous the differences between two works the less likely it is that they will create the same aesthetic impact so that one will appear to have been appropriated from the other."

The Court cautioned, finally, that a general impression of similarity is not sufficient to make out a case for infringement.

With this legal frame work I think it is time to engage in the exercise certainly implied in *Wickham*, that similarity is determined by a comparison of the works. Now Plaintiffs have conceded there can be no copyright infringement found as a result of similarities between Silva's and MacLaine's "factual descriptions of the Great Pyramid of Giza, a road sign in the Andes asserting Flying Saucers Do Exist, UFO Contact Point, the river, mineral baths, the Andes and the names of and mileage distance between the cities. . . ." Thus, these portions of the books will not be discussed.

Defendants have prepared a fairly comprehensive schedule of passages containing similar material both in "Date With The Gods" and "Out On A Limb". Most of these examples are, in my opinion, stretching the concept of similarity to absurd extremes. There seem to be about five specific portions of the books that Plaintiff would emphasize in their position that there is substantial similarity.

First is a description of Rama by Silva in "Date With The Gods" and the description of David in MacLaine's book of Mayan. Compare: "Date With The Gods", pages 20 and 21:

"By her moves and speech I gathered that she was a well educated American kid. More or less in her twenties, judging by her looks and fair skin, medium height, petite, and very pretty face with long black hair. She was wearing jeans, jail like shirt, and a heavy army coat with some synthetic fur around the hood. She had on hiking boots, and her appearance was pleasant even though hippies have never been my cup of tea as far as socializing was concerned. She had all the characteristics of being one of those pot

heads who roam around the world, hitchhiking, asking for spare change.

* * * *

"There was something strange about her eyes; though I could not put my finger exactly on what it was."

Compare that with "Out On A Limb", pages 299 to 300:

"When I first saw her I thought she was the most beautiful woman I had ever seen. She seemed almost translucent, I mean her skin was shining. I didn't notice what she was wearing, jeans, probably, but the way she moved was like flowing. And I remember I could not take my eyes off her face.

* * * *

" 'What else did she look like?' I asked. 'Small,' he said. 'Real small and petite, with long thick black hair, this marvelous very white transparent skin, and dark, dark eyes almost almond-shaped eyes. Not Oriental eyes, I mean not with those lids, but with a tilt, a slant to them.' "

There may be some similarities between these descriptions but certainly there is no outright copying and indeed the picture painted in the reader's mind could be of two very different looking women. Moreover, Silva does not deny that he described the extraterrestrial person he met to MacLaine, and Silva's copyright in "Date With The Gods" cannot bar MacLaine from describing interviews she had with others and her own experiences. I think simply stated these two passages are not substantially similar and an average reasonable layperson, upon examination, could not find substantial or sufficient similarity to establish copyright infringement.

A second area of arguable similarity between the two books is where atomic structure and its relationship to the spiritual world is discussed. Compare "Date With The Gods" Pages 74 and 118 to 124, with "Out On A Limb" at Pages 322 to 327. To the extent that both works review basic scientific theories concerning the structure of the

atom, neutrons, protons and electrons, and their rotation akin to a miniature solar system, clearly there can be no copyright infringement there. Scientific facts lend themselves to a very limited manner of expression and do not create an inference of copying. For authority you can see 3 Nimmer on Copyright, Section 13.03 (A) at Pages 13-33.

Other similarities between the works occur in their description of the matter between these basic components of the atom, which matter holds the atom together and which is what the soul or spirit is made of. MacLaine's work uses the following description of this force, as does Silva's work: "Third force," "organizer of all matter," "thinking element of nature," "the cohesive element of the atom," and "soul" or "spirit." Clearly the two authors are on to a substantially similar idea, but not only is that idea not the unique property of Plaintiff Silva, for many other authors have discussed this theory, but furthermore one must keep in mind that it is the expression of the idea that must be examined. An overall examination of these portions of the two books reveals that there are substantial differences between the copyrighted material and the alleged copy, such that one must conclude in Defendant's favor that there is no substantial similarity. For example, Silva's work includes drawings and a discussion of ananas and anionites that are not included in MacLaine's work. While both mention that this third force or spirit never dies unlike the physical body, MacLaine's work makes a much clearer connection between this fact and the belief in reincarnation and karma. These passages merely raise a general impression of similarity which under *Mihalek* is not sufficient to make out a case of infringement.

Third, in both works the authors describe their experiences with astral projection, that is, out-of-body experiences when the spirit temporarily leaves the body and travels to other places on earth or into the cosmos. The only real similarity between the passage in "Date With The Gods" at Page 174 to 178 and with "Out On A Limb" at Pages 327 to 329 is that each author recalls, as his or

her spirit left the body, observing a silver cord maintaining the attachment between the spirit and the body. However, the existence of this silver cord is a phenomena recognized in other metaphysical literature and MacLaine cannot be considered to have copied an expression of an idea from Silva. In both works the experience with astral projection takes place when the authors are gazing into candles. Salva's description is that of Rama instructing him on the technique to use in astral projection, which he finds successful, and which he describes as becoming part of the flame and separated from his body. In contrast, MacLaine describes her experience as one that occurred, not as an effort, but almost spontaneously and without warning. She actually describes leaving the earth's surface and soaring so high that she can see curvature of the earth. There is simply no copying by MacLaine of Silva's work in these passages.

Fourth, there is a claimed similarity in passages where Rama gives Silva a bracelet in "Date With The Gods" and David gives MacLaine a bracelet in "Out On A Limb." In "Date With The Gods" the citation is at Pages 360 to 361 and in "Out On A Limb" at Page 322. This is "Date With The Gods":

"I should give you this. She placed a metal band around my left wrist. Offhand I couldn't tell what kind of metal it was. It looked like the P.O.W. bands people were wearing during the Viet Nam War. As she adjusted it, she was saying: "This is plain stainless steel, no one would want to steal it from you. You can get these at any store for 65 cents, but this one has a specified electro-magnetic charge that is tuned into your personal vibrations."

* * * *

"There are also a couple of my vibrations in there. Many times you will hear me think. Since this is steel it will keep away evil forces. 'What do you mean?' 'Evil forces, are also third energy, very capa-

ble and powerful: Witchcraft, voodoo, jinx, curses, vampires, etc., all those can be repelled by steel.' ”

And the passage from “Out On A Limb” is this:

“As we headed that way David reached into his pocket and handed me a bracelet of what looked like silver. It was just like the one he wore all the time. ‘Mayan gave me this,’ he said. ‘I want you to have it. Wear it on your wrist all the time when you are here. It will help make things more clear.’

“I put it on wondering what he meant. ‘What’s it made out of?’ I asked. ‘Oh,’ he said. ‘I don’t know. It’s hard to say but it works.’

‘What do you mean? It makes what work?’ I could not understand what he was talking about.

‘Well, when I wear mine, I feel my thoughts are somewhat more amplified so I think with more clarity.’

‘How come?’

‘I don’t know exactly,’ he said, ‘It is something to do with what she calls the third force.’ ”

Simply, there is no substantial similarity between these two passages, except the idea of giving a bracelet, from one person to another.

Finally, in their brief Plaintiff complains of a similarity between Silva’s description of extraterrestrials he met on his UFO ride in “Date With The Gods” and MacLaine’s recounting of David’s description in another book she wrote, “It’s All in the Playing.” In “Date With The Gods” Silva writes:

“He had a nice face; benevolent featuring attitude, long nose, and slanted eyes—not like Rama’s, not oriental either. When he looked at me I noticed he had no eyelashes and he didn’t blink.”

According to Plaintiffs, “It’s All in the Playing” contains the following passage although we do not have a copy:

human except that he was small with ears very close to his head, and had no eyelashes or eyelids." Not only is MacLaine's expression not a copy of Silva's, but I cannot conclude merely from the comparison of these limited passages that MacLaine's work infringed Silva's copyright in "Date With The Gods".

I think in summary, although there are some similarities between the passages set forth above, a close examination reveals there is no substantial similarity and that an average reasonable layperson upon such examination could not find substantial or sufficient similarity to establish copyright infringement.

Furthermore, one must consider these similarities in the context of the entire works at issue. The proper inquiry is whether Defendant's alleged infringing work has captured the total concept and feel of the Plaintiff's work. While both discuss similar ideas, it is in a very different context. Silva seems intent on relating his experience at meeting an extraterrestrial who, in this brief, he for the first time declares a literary device and was not real. The clear implication of the book is that he actually met an extraterrestrial and is conveying her teachings to his readers. MacLaine, on the other hand, in her book is embarking on sort of a research project aimed at giving her peace of mind and explaining where she fits in this world and how she can come to terms with her personal relationships.

I conclude that there is no substantial similarity between Silva's "Date With The Gods" and MacLaine's "Out On A Limb", and that in fact there are substantial differences between the copyrighted material and the alleged copy that justify the granting of Defendant's motion for summary judgment and I will grant the Defendant's motion for summary judgment on Count 1 based upon lack of substantial similarity.

I do want to say a word, however, about the theory of non-exclusive license on Count One. It appears to me that

in light of Silva's relationship with MacLaine, the facts and circumstances surrounding it, his correcting the text, his giving advice, his encouraging the writing of the book, his sending of the manuscript, his revisions, all make clear, and the fact that no Complaint was made at any time until some six and a half years later, that it makes clear that Silva granted MacLaine a license, an oral license, and certainly the grant of permission may be given orally or may be implied from conduct, 3 Nimmer Section 10.03(A) at Pages 10-36, and whatever its origin, a non-exclusive license is enforceable because of the impracticality of requiring written licenses in all circumstances. So I think it is clear here that Silva granted MacLaine a non-exclusive oral license to use part of "Date With The Gods."

With reference to laches it seems to me that that can be an additional basis for granting summary judgment. I mean Silva knew in 1981 what MacLaine was publishing, what they were doing, and waited until 1987 to bring any action, and I do feel that that constitutes laches.

With reference to the unfair competition count, Count Two, I think there is no question that that must be dismissed. First, the only basis, jurisdictional basis was that it was appended to a substantial and related claim of copyright infringement. However, it appears to me that there is a clear preemption on it. Secondly, there is just no statement of claim of unfair competition here. It appears to me the writing a letter saying that a suit will be brought unless he stops representing himself as Oavid and unless he stops using MacLaine's picture in publicity just states no claim for unfair competition.

So for these reasons I will grant summary judgment, no cause of action on the entire case.

You may present an order.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 87 CV 74500 DT

Hon. Horace Gilmore

CHARLES A. SILVA and LIVING WATERS PUBLISHING AND
DISTRIBUTING, INC., a Michigan corporation,
Plaintiffs,

vs.

SHIRLEY MACLAINE, COLIN HIGGINS, STAN MARGULIES,
BRANDON STODDARD, AMERICAN BROADCASTING COMPANIES, INC., a New York Corporation; and BANTAM BOOKS, INC., a Delaware corporation, jointly and severally,
Defendants.

ORDER

At a session of said Court, held in the
Federal Building, Detroit, Michigan on
Aug. 22, 1988

PRESENT: Hon. Horace Gilmore

Defendants Shirley MacLaine, Colin Higgins, Stan Margulies, Brandon Stoddard, American Broadcasting Companies, Inc. and Bantam Books, Inc. (the defendants) having moved for summary judgment in this action, plaintiffs Charles A. Silva and Living Waters Publishing and Distributing, Inc. having filed a response and a cross motion for summary judgment, and the Court having considered briefs and heard argument:

IT IS ORDERED, for the reasons stated by the Court in its opinion from the bench, that defendants' motion for

summary judgment is **GRANTED**, that plaintiffs' cross-motion for summary judgment is **DENIED**, and that plaintiffs' complaint is dismissed with prejudice as to all defendants.

/s/ **Horace W. Gilmore**
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 88-1968/89-1038

CHARLES A. SILVA, *et al.*,
Plaintiffs-Appellants,

v.

SHIRLEY MACLAINE, *et al.*,
Defendants-Appellees

ORDER

[Filed Dec. 21, 1989]

BEFORE: KRUPANSKY and WELLFORD, Circuit
Judges; and CELEBREZZE, Senior Circuit
Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

